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No. 57328-4-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

CAMBRIDGE TOWNHOMES, LLC, a Washington limited liability company; POLYGON NORTHWEST COMPANY, a Washington general partnership,

Appellants,

v.

PACIFIC STAR ROOFING, INC., a Washington corporation; P.J. INTERPRIZE, INC., a Washington corporation,

Respondents.

BRIEF OF RESPONDENT P.J. INTERPRIZE, INC.

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I. ASSIGNMENTS OF ERROR

Respondent P.J. Interprize, Inc. ("Corporation") assigns no error to the trial court's decisions granting its motions for summary judgment dismissing Appellants Polygon Northwest Company's and Cambridge Townhomes, LLC's claims against it.

II. STATEMENT OF ISSUES

1. Washington law provides that RCW 23B.14.340 does not govern post-dissolution claims based on pre-dissolution contractual rights and that post-dissolution claims are barred by the common law. Is Cambridge's contingent breach of contract claim and indemnity claim, which did not accrue until after the Corporation's dissolution, barred under Washington common law?

2. Washington law has consistently held that indemnity clauses are subject to fundamental rules of contract construction. The trial court properly construed the indemnity clause in the Corporation's subcontract as a whole and found that it only applies to tort claims, not economic damages caused by construction defects. Should this Court adopt an interpretation of the indemnity clause which would virtually cast tens of thousands of contractors in this State into the role of an insurer of all losses arising out of a construction project, in violation of our Supreme Court's decision in *Jones v. Strom Construction Co., Inc.*?

3. Cambridge's only damages are the amounts it allegedly paid to the HOA in settlement. Under Washington law, a party is not entitled to indemnity absent a contractual indemnity clause. The trial court properly dismissed Cambridge's breach of contract claim because it had not proved any damages beyond those for indemnity. Is Cambridge entitled to recover indemnity damages under a separate breach of contract theory?

4. Cambridge never filed suit against the sole proprietorship of Gerald Utley d/b/a P.J. Interprize, which is the entity that performed work on Phase II. In February 2004, the sole proprietorship received a Chapter 7 bankruptcy discharge of Cambridge's claims. Further, Cambridge's Complaint did not assert a claim against the Corporation for successor liability. Did the trial court properly rule that the Corporation is not liable for Cambridge's claims relating to the sole proprietorship's work?

5. On November 4, 2005, more than a year and eight months after Cambridge filed its Complaint and only one month before trial, Cambridge filed a motion to add the sole proprietorship of Gerald Utley d/b/a P.J. Interprize as a party. The sole proprietorship's work on Phase II was completed in November 1998 and Cambridge's claims were barred by the six year statute of

limitation on written contracts. Further, under 11 U.S.C. § 727, the discharge of the sole proprietorship in bankruptcy operates as an injunction against any action against it. Did the trial court properly deny Cambridge's motion to amend its Complaint to assert claims against the sole proprietorship?

6. During construction of the project, Cambridge's superintendents and waterproofing expert inspected and accepted the work of the Corporation as consistent with the contract, plans, specifications, industry standards, and building code. Under Washington law, if an alleged defective condition is known, visible, or readily discoverable, and the work is accepted, waiver exists. The trial court ruled that the Corporation's liability is limited to those defects which are latent. Does Cambridge have the burden of proving those defects which are alleged to be latent at trial?

7. Cambridge attempted to introduce the declaration of Mark Jobe on the issue of whether Cambridge's superintendents could have been inspected the vinyl siding, weather-resistive barrier, flashings and trim during construction. Mark Jobe was not present during the construction of the project and has no experience in construction of multi-family residences or condominiums. Did the trial court properly strike Mark Jobe's

statements because they were based on pure speculation and conjecture?

III. COUNTER STATEMENT OF THE FACTS

Polygon Northwest Company ("Polygon") was the developer of a condominium project called the Cambridge Townhomes Condominium project. (CP 4). Cambridge Townhomes, LLC ("Cambridge") was the general contractor on the project. (CP 4). The Cambridge Townhomes Condominiums consist of 209 units in 41 buildings ("the Project"). The Project was constructed in three phases. Phase I consists of Buildings 1 through 10, Phase II consists of Buildings 11 through 31, and Phase III consists of Buildings 32 to 41. (CP 98-111 and 456). All of the subcontracts for construction of the Project were with Cambridge, not Polygon.

Defendant 4 Bee's Siding, Inc. contracted with Cambridge to install the vinyl siding and trim on Phase I of the Project. (CP 98-99).

On August 26, 1998, the sole proprietorship of Gerald Utley d/b/a P.J. Interprize ("sole proprietorship") contracted with Cambridge under an "Agreement of Subcontract" to install vinyl siding and trim on Phase II of the Project. (CP 98-101). The sole proprietorship's contract with Cambridge did not include a scope of

repair for Phase II. (CP 98-101). The sole proprietorship's work on Phase II was completed by November 1998. (CP 98-101). The temporary certificate of occupancies for the last four buildings completed in Phase II were issued on October 1, 1999. (CP 2276-2279).

The Corporation was not formed until January 1999. (CP 98-99). Four months later, on April 21, 1999, the Corporation contracted with Cambridge under an "Agreement of Subcontract" to install the vinyl siding and trim for Phase III of the Project. (CP 98-111). The first page of the Corporation's Agreement of Subcontract states that it incorporates by reference a "Master Agreement" with no date. (CP 109-111). The Master Agreement dated January 7, 1999 contains an indemnity agreement which states as follows:

> SUBCONTRACTOR shall defend, indemnify, and hold CONTRACTOR harmless from any and all claims, demands, losses and liabilities to or by third parties arising from, resulting from, or connected with, services performed or to be performed under this Subcontract by SUBCONTRACTOR or SUBCONTRACTOR'S agents, employees, subtier Subcontractors, and suppliers to the fullest extent permitted by law and subject to the limitations provided below:
>
> SUBCONTRACTOR'S duty to indemnify CONTRACTOR shall not apply to liability from damages arising out of bodily injury to persons or damages to the property caused by, or resulting from, the sole negligence of CONTRACTOR, or CONTRACTOR'S agent or employees.

> SUBCONTRACTOR'S duty to indemnify CONTRACTOR for liability for damages arising out of ***bodily injury to person or damages to property*** caused by or resulting from the ***concurrent negligence*** of CONTRACTOR or CONTRACTOR'S agents or employees ***shall apply only to the extent of negligence of SUBCONTRACTOR'S*** or SUBCONTRACTOR'S agents, employees, and subtier Subcontractors and suppliers.
>
> SUBCONTRACTOR specifically and expressly waives any immunity that may be granted it under the Washington State Industrial Act, Title 51, RCW. Further, the indemnification obligation under this Subcontract shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable to or for any third party under worker's compensation Acts, Disability Benefit Acts, or other employee benefits acts.
>
> SUBCONTRACTOR'S duty to defend, indemnify, and hold CONTRACTOR harmless as to all claims, demands, losses, and liabilities shall include CONTRACTOR'S personnel related costs, reasonable attorney fees, court courts (sic), and all related expenses.

(CP 271-275), ¶Q) (Emphasis ours).

Both the Subcontract Agreement and the Master Agreement for Phase III specifically refer to the "CONTRACTOR", which is designated only as "Cambridge Townhomes, LLC". No where on the Agreement of Subcontract or the Master Agreement is Polygon designated as "CONTRACTOR".

Cambridge initiated several changes in construction on Phase III that were not required on Phases I or II. In Phase III, Cambridge had the framer install a Moistop E-Z Seal penetration flashing behind the flange of the windows at the sill. (CP 1154-

1156, Deposition of Jay Wolf, 38:21 to 40:6). Additionally, Cambridge required the Corporation to install an ice and water shield flashing over the jambs and the heads of the windows and to install Tyvek over the top of the ice and water shield. (CP 1154-1156, Deposition of Jay Wolf, 38:21 to 40:6).

Starting in Phase III of the project, Cambridge also retained a waterproofing expert of Barghausen Investigative Engineers to inspect and document the work during construction to ensure that the work was being done consistent with the plans, specifications, industry standards and building code at the time. (CP 118-1127; CP 1151-1152; CP 1135; CP 2236-1141). Cambridge's site superintendent also testified that he inspected the installation of the weather resistive barrier, vinyl siding, and flashings on this project to verify that the work was in accordance with Polygon's plans and specifications. (CP 1167-1170, Deposition of Mike Sanderson, 20:23 to 23:1). There is no evidence that the Corporation breached the terms of its subcontract and caused any damage.

Contrary to Polygon's assertion, Polygon produced no evidence that it tendered the defense of the HOA's claims to the Corporation. In August 2003, the Corporation received a letter from Preg O'Donnell & Gillett inviting the Corporation to attend a group

meeting on September 8, 2003 to discuss claims raised by the Cambridge Townhomes Owners Association. (CP 2083-2084). The letter states:

> In a separate letter, we are tendering the defense of Polygon to your insurance carrier[s] based on Polygon's status as an additional insured under your insurance policy. We will seek their participation in this process from the outset, as well.

Id.

Although the letter states Polygon *will* tender the defense of the HOA's claims to the Corporation's *insurance carrier* as an additional insured, Polygon never tendered the claims to the Corporation.

In February 2004, Gerald Utley d/b/a P.J. Interprize, Inc. filed for bankruptcy in the United State Bankruptcy Court for the Western District of Washington. (CP 1183-1207). The Bankruptcy Petition lists the Debtors as Gerald and Mary Utley "dba P.J. Interprize, Inc." (1183-1184). The schedules of creditors holding secured and unsecured claims list Cambridge Townhomes, LLC as a creditor. (CP 1188). On February 27, 2004, the Debtors received a Chapter 7 bankruptcy discharge under 11 U.S.C. § 727 (CP 1206-1207). Any claims Cambridge may have had against Gerald Utley or the Corporation relating to the Project were discharge in bankruptcy.

A month later, on March 24, 2004, Cambridge Townhomes, LLC and Polygon Northwest Company filed a Complaint against twelve (12) subcontractors, including the Corporation, for alleged deficiencies relating to the construction of the Project. (CP 237-252). The Complaint did not name the sole proprietorship of Gerald Utley d/b/a P.J. Interprize as a party. (CP 237-252). The Complaint alleges causes of action against the Corporation for breach of contract, contractual indemnity, and breach of the duty to defend. The Complaint does not allege a cause of action against the Corporation for successor liability.

Two months after filing their Complaint, on May 28, 2004, Cambridge Townhomes, LLC and Polygon Northwest Company filed a "Motion for Relief from Automatic Stay to Pursue Insurance of Debtor" in the United States Bankruptcy Court to pursue their claims against the Corporation in this action. (CP 277-283). The Motion states that "a separate lawsuit has now been filed by Polygon under King County Superior Court cause number 04-2-06304-3SEA to recover sums paid out to the HOA from the responsible subcontractors, **including Debtor P.J. Interprize**" and that Cambridge has asserted claims against the Debtor for breach of contract and indemnity. (CP 278-279). The Motion for Relief

from Stay pertained only to the Corporation since it is the only party named in King County Superior Court cause number 04-2-06304-3SEA. Polygon never filed a motion seeking relief from the automatic stay to pursue claims against the sole proprietorship. Cambridge's Motion requested that the Bankruptcy Court issue an order granting relief from the automatic stay in order to pursue the *Corporation* to the extent of any insurance proceeds which may be available to pay any judgment in the King County Superior Court action. (CP 277-283). In June 2004, Judge Thomas Glover issued an Order granting Polygon's motion for relief from the automatic stay to pursue the *Corporation's* insurance proceeds in this action. (CP 285-286). The Bankruptcy Court's Order makes it clear that Cambridge and Polygon are only entitled to pursue claims against the Corporation in this action to the extent such claims are covered by the Corporation's liability insurance.

Cambridge's assertion in its opening brief and in its Complaint that it settled the HOA's claims for $5.3 million on November 21, 2003 is not supported by the evidence. (Appellant's Brief, page 6; CP 241). The November 21, 2003 settlement agreement was contingent on funding within 30 days, which Cambridge admits never occurred. (CP 2334-2336). Consequently,

the HOA subsequently filed suit against Cambridge and Polygon on December 22, 2003. (See Appendix A). Cambridge and Polygon never produced any evidence of a subsequent settlement with the HOA. More importantly, Cambridge and Polygon never produced any proof that they paid any settlement to the HOA and the date any such payment was made. The HOA's action against Cambridge and Polygon was not dismissed until **July 27, 2004**, more than four months after the Corporation was dissolved. (See Appendix B). This confirms that Cambridge and Polygon did not make a settlement payment to the HOA until at least July 2004.

A. MOTIONS FOR SUMMARY JUDGMENT.

1. May 6, 2005 Summary Judgment Hearing.

The Corporation and Pacific Star Roofing, Inc., along with several other third-party defendants, filed a Motion for Summary Judgment of Cambridge and Polygon's claims on the basis that the indemnity clause contained in the subcontracts did not cover damages caused by construction defects, the indemnity claims are post-dissolution claims that are barred under the *Ballard Square* decision, and because Cambridge has no damages to support a breach of contract claim that are separate and apart from its indemnity claim. (CP 1773-1778 and CP 138-157; CP 97-114; CP 233-378). Cambridge argued that the first paragraph of the

indemnity agreements are all inclusive and cover any claims that may be asserted against it so long as the claim has some connection with the defendants' work. (CP 494-495). Cambridge also argued that its mere knowledge of the HOA's claims prior to dissolution makes it a "right or claim existing" under RCW 23B.14.340. (CP 499-501). On May 16, 2005, the Court granted Defendants' Motions for Summary Judgment as to Cambridge/Polygon's claims for breach of the duty to defend and indemnify and denied without prejudice the Corporation's motion for summary judgment of Cambridge's breach of contract claim. (CP 745-751).

2. July 8, 2005 Summary Judgment Hearing.

On May 18, 2005, Janes Brothers Waterproofing filed a motion for summary judgment of Cambridge's remaining claim for breach of contract under the principle of acceptance of performance. (CP 877-900). Cambridge argued that the doctrine only applied to certain personal injury tort claims by third parties. (CP 1004-1021). The trial court disagreed and ruled that Janes Brothers Waterproofing's liability is limited to those defects which are latent and that Cambridge has the burden of proving those defects which are alleged to be latent. (CP 1065-1068).

3. September 8, 2005 Summary Judgment Hearing.

On August 12, 2005, the Corporation filed a motion for summary judgment of Cambridge/Polygon's remaining breach of contract claim. (CP 1075-1093; CP 1097-1299; CP 1072-1074). The Corporation argued that it never contracted with *Polygon* for any work on the project. Moreover, the Corporation argued that it was not contractually responsible for any work on Phase II, that Cambridge has no damages to support a breach of contract claim which are separate and apart from its indemnity claim, and that Cambridge's claims should be dismissed based on the principle of acceptance of performance. The trial court ruled that as a result of the bankruptcy discharge, Cambridge may not pursue claims against the Corporation for the sole proprietorship's work. The trial court also ruled that the Corporation's liability is limited to those defects which are latent and that Cambridge has the burden of proving those defects which are alleged to be latent. (CP 2064-2068).

4. November 22, 2005 Summary Judgment Hearing.

On October 21, 2005, the Corporation filed its final motion for summary judgment of Cambridge/Polygon's remaining breach of contract claim contending it was a dissolved corporation at the time of the filing of the Complaint and that Cambridge's post-dissolution

breach of contract claim is barred under Washington common law. (CP 1984-1982). On November 22, 2005, the trial court granted the Corporation's motion and dismissed Cambridge/Polygon's remaining breach of contract claim. (CP 2396-2398). Cambridge/Polygon subsequently filed an untimely motion for reconsideration, which was denied. (CP 2444-2446).

IV. ARGUMENT

A. CAMBRIDGE/POLYGON'S CLAIMS AGAINST THE CORPORATION ARE POST-DISSOLUTION CLAIMS THAT ARE BARRED UNDER WASHINGTON COMMON LAW.

1. Cambridge/Polygon never tendered the defense of the HOA's claims to the Corporation.

Cambridge/Polygon contends that its indemnity claim is a pre-dissolution claim under RCW 23B.14.340 because it tendered the defense of the HOA's claims to the Corporation prior to dissolution. Cambridge claims the August 2003 letter to the Corporation is a tender of defense. The August 2003 letter merely invites the Corporation to attend a group meeting on September 8, 2003. Although Cambridge states it may tender the defense of Polygon to the Corporation's insurance carrier based on its status as an additional insured, Cambridge never presented any evidence that it actually tendered the claim to the Corporation.

2. Cambridge never provided any proof that it actually paid a settlement to the HOA and the

evidence supports a finding that payment was not made until after the Corporation's dissolution.

Washington law provides that an indemnity claim does not begin to accrue until the party seeking indemnity pays or is legally adjudged obligated to pay damages to a third-party.[1] Until a claim is accrued, it is not justiciable and a party does not have a right to apply to the courts for relief.[2] Thus, before an indemnity claim arises (i.e., before payment is made), the claim cannot possibly be prosecuted nor can it be considered to exist.

Cambridge has not been adjudged legally liable to the HOA for any damages. Thus, Cambridge was required to prove that it actually made payment to the HOA and the date the payment was made, before it is entitled to seek indemnity from the Corporation. Cambridge claims that a November 21, 2003 settlement agreement is evidence of its payment of damages to the HOA. However, Cambridge's e-mail sent on December 1, 2003 to the third-party defense counsel states that "Polygon has entered into a Settlement Agreement with the HOA *subject to funding* . . ." and requests that the subcontractors to participate in the settlement. The e-mail states that the funding deadline is December 21, 2003. Cambridge

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[1] *Parkridge Assoc., Ltd. v. Ledcor Industries, Inc.*, 113 Wn. App. 592, 598, 54 P.3d 225 (2002).

[2] *See, e.g., Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 353, 997 P.2d 353 (2000).

admits that the settlement fell through because it was not funded by the December 21, 2003 deadline. Consequently, on December 22, 2003, the HOA filed suit against Cambridge and Polygon. Thus, by December 22, 2005, no settlement agreement had been reached between the parties.

The HOA did not dismiss its claims against Cambridge until **July 27, 2004,** eight months later. If Cambridge had settled and made payment to the HOA prior to the Corporation's dissolution in March 2004, it had a duty to provide proof of such payment. For purposes of this appeal, it must be presumed that Cambridge/Polygon did not make any payment to the HOA until after the Corporation's dissolution on March 22, 2004.

3. Cambridge's indemnity claim against the Corporation is a post-dissolution claim that is barred under Washington common law.

Cambridge erroneously contends that its indemnity claim is a pre-dissolution claim under RCW 23B.14.340 because it gave notice to the Corporation of a potential indemnity claim prior to its dissolution. Washington's survival statute, RCW 23B.14.340, provides a two year period in which to file suit against a dissolved corporation for any right or claim existing or liability incurred prior to

such dissolution. Claims arising after a corporation's dissolution are governed by the common law and are barred.[3]

RCW 23B.14.340 uses the terms "any right or claim *existing* or liability incurred". Nowhere does RCW 23B.14.340 use the term "known". This court in *Ballard Square* determined that RCW 23B.14.340 is not ambiguous and applies only to liability incurred before a corporation dissolves.[4]

At common law, the dissolution of a corporation marked the death of its corporate existence and, in the absence of statutory provisions to the contrary, terminated that existence for all purposes whatsoever, and all claims against that corporation, ***whether known, pending or contingent***, were terminated by operation of law.[5] Consequently, whether a corporation had notice of a potential indemnity claim prior to dissolution is irrelevant. RCW 23B.14.340 applies only to a claim or right that "existed" before a corporation dissolves.[6]

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[3] *Ballard Square Condo. Owners Ass'n v. Dynasty Construction Co.*, 126 Wn. App. 285, 294, 108 P.3d 818 (2005).
[4] *Ballard Square*, 126 Wn. App. at 291.
[5] *Bortle v. Osborne*, 155 Wash. 585, 597, 285 P. 425 (1930); *Ballard Square Condominium Owners Association v. Dynasty Construction Company*, 126 Wn. App. 285, 108 P.3d 818, 820 (March 2005).
[6] *Ballard Square*, 126 Wn. App. at 291.

A cause of action for indemnity *arises* when payment is made.[7] The statute of limitations on an indemnity action therefore begins to run at that point.[8] Washington Courts have equated the terms "exist" and "accrue."[9] Thus, before an indemnity claim arises (i.e., before payment is made), the claim cannot possibly be prosecuted nor can it be considered to exist. Until an indemnity claim accrues, there is no right to assert an indemnity claim. Cambridge did not have a right to indemnity until it made payment to the HOA, which was after the Corporation's dissolution. Therefore, Cambridge's indemnity claim is a post-dissolution claim that is barred under *Ballard Square*.

4. Cambridge's breach of contract claim is a post-dissolution claim.

In *Ballard Square*, this court held that RCW 23B.14.340 did not govern post-dissolution claims based on pre-dissolution contractual rights:

> In reversing the trial court, this court noted that Washington's statute was based on section 14.06 of the Model Business Corporations Act (Model Act). According to the Model Act's official comments, section 14.06 was "not intended to cover claims which are contingent or arise based on events occurring after the effective date of dissolution." That role was

[7] *Earley v. Rooney*, 49 Wn.2d 222, 228, 299 P.2d 209 (1956).
[8] *Smith v. Jackson*, 106 Wn.2d 298, 302, 721 P.2d 508 (1986); *Earley, supra*, 49 Wn.2d at 228.
[9] *See, e.g., Caughell v. Group Health Coop.*, 124 Wn.2d 217, 876 P.2d 898 (1994); *In re Estate of Hitchman*, 100 Wn.2d 264, 466-469, 670 P.2d 655 (1983).

> reserved for section 14.07. We held that the fact the Legislature adopted section 14.06 but not section 14.07 suggested its intent to place a time restriction only on claims existing before the corporation's dissolution. Therefore, in Smith, because the plaintiff's identity and the nature of his potential claim were known before the dissolution by virtue of the 1990 contract, but any potential claim was not ripe by the time the corporation dissolved, the survival statute did not apply to the case.[10]

Section 14.06 provides that a corporation may dispose of the known claims against it by notifying its known claimants in writing of the dissolution at any time after its effective date. Section 14.07 addresses contingent and claims unknown to the corporation at the time of dissolution. Contingent claims, which frequently include breach of contract and indemnity claims, were provided a statutory limitation for filing against a dissolved corporation under Section 14.07. Such claims are necessarily contingent upon the occurrence or nonoccurrence of future events, i.e., the events which will or will not result in liability. By its language, Section 14.07 targets claims which likely will arise from contractual claims and indemnification agreements which are necessarily contingent on the events which will or will not result in liability. Washington's Legislature did not adopt 14.07 which establishes a survival period for contingent breach of contract and indemnity claims. RCW

[10] *Ballard Square*, 126 Wn. App. at 293.

23B.14.340 and 23B.14.060 express a legislative intent to retain the common law rule in the context of contingent post-dissolution claims and to protect shareholders, officers and directors of a dissolved corporation from prolonged and uncertain liability.[11] Cambridge's contingent breach of contract claim is not governed by RCW 23B.14.340 and is barred under common law.

Further, in order to support its separate cause of action for breach of contract, Cambridge must prove both a breach and damages sustained as a direct and proximate result of the alleged breach.[12] It is not enough to prove a breach of contract.[13] A cause of action is triggered by the infliction of actual and appreciable damage.[14] Until Cambridge allegedly paid the HOA in settlement, it did not suffer any appreciable harm. Since Cambridge's breach of contract claim was not ripe until after the Corporation's dissolution, its breach of contract claim is a post-dissolution claim and is barred under common law.

Cambridge contends for the first time on appeal that the discovery rules applies to its breach of contract claim, citing

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[11] See *Ballard Square*, 126 Wn. App. 285, 108 P.3d 818, 823-24 (2005).
[12] *Lee v. Bergsten*, 58 Wn.2d 462, 364 P.2d 18 (1961).
[13] *Ketchum v. Albertson Bulb Gardens*, 142 Wash 134, 139, 252 P. 523 (1927).
[14] *Hudesman v. Meriwether Leachman Associations, Inc.*, 35 Wn. App. 318, 322, 666 P.2d 937 (1983).

Architectonics Constr. Mgmt., Inc. v. Khorram, 111 Wn. App. 725, 45 P.3d 1142 (2002). The *Architectonics* decision does not apply to this case. Cambridge's complaint was filed on March 24, 2004, after the Washington Legislature amended RCW 4.16.326(1)(g), which did away with the discovery rule in breach of contract claims. Moreover, our Supreme Court has ruled that the discovery rule does not apply to breach of contract claims.[15]

5. RCW 23B.14.050 does not abrogate the common law bar against post-dissolution claims.

Cambridge cites no authority for its argument that RCW 23B.14.050 supplants the common law and resurrects its post-dissolution claims. This court in *Ballard Square* squarely rejected Cambridge's argument. In *Ballard Square*, this court considered whether RCW 23B.14.050, which allows a corporation to be sued during an indefinite winding up period, abrogates the common law and preserves post-dissolution claims against an administratively dissolved corporation. The court ruled that RCW 23B.14.050 does not address claims arising after a corporation has completed the winding up process.[16]

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[15] *See Taylor v. Puget Sound Power & Light Co.*, 64 Wn.2d 534, 392 P.2d 802 (1964); *North Coast Enterprises, Inc. v. Factoria Partnership*, 94 Wn. App. 855, 974 P.2d 1257 (1999).

[16] *Ballard Square*, 126 Wn. App. at 295-96.

In *Ballard Square* the court noted that although there is an unlimited winding up period, the common law controls post-dissolution claims. If the court were to accept Cambridge's reasoning, a dissolved corporation could be sued indefinitely following dissolution, regardless of RCW 23B.14.340 and the common law. RCW 23B.14.050 does not apply to Cambridge's post-dissolution claims.

6. The July 7, 2006 amendment to RCW 23.B.14.340 has no application to Cambridge's post-dissolution claims.

Cambridge asserts on appeal that the amendment to RCW 23B.14.340 is retroactive and should apply to its post-dissolution claims because it "clarified" that claims arising after dissolution can be asserted against a corporation. Senate Bill 6596 amended RCW 23B.14.340 to provide a new survival period of two years for post-dissolution claims against a dissolved corporation.

As a general rule, a statutory amendment is like any other statute and applies prospectively only.[17] The strong presumption that an amendment is prospective can be overcome only if it is shown that the legislature intended the statute to apply retroactively

[17] *In Re Personal Restraint of Stewart*, 115 Wn. App. 319, 332, 75 P.3d 521 (2003).

or if the amendment is "clearly curative".[18] The exceptions to the general rule of prospective application apply only if such retroactive application does not violate any constitutional prohibition.[19]

There is no evidence that the Legislature expressed an intent that SB 6596 be applied retroactively. Moreover, the Senate Bill is not "clearly curative" or remedial in any way. The Senate Bill creates new law preserving post-dissolution claims against a dissolved corporation. Moreover, Senate Bill 6596 can not retroactively govern this lawsuit which was filed more than two years before Senate Bill 6596 became effective.

Even assuming Senate Bill 6596 is curative, curative amendments are not to be given retroactive effect if they contravene any judicial construction of the statute.[20] It is a violation of Washington's Constitution for the Legislature to amend an original statute and apply the new statute retroactively so as to contravene a prior judicial decision interpreting the original statute.[21] If this were allowed, the legislative branch would, in effect, be the Court of last resort and the Doctrine of Separation of

[18] ***In re F.D. Processing, Inc.*** 119 Wn.2d 452, 460 832 P.2d 1303 (1992).
[19] *In re Personal Restraint of Stewart*, 115 Wn. App. at 332.
[20] ***In re F.D. Processing, Inc.*** 119 Wn.2d 452, 461, 460 832 P.2d 1303 (1992); *Barsad v. Stewart Title Guarantee Co.*, 145 Wn.2d 528, 537, 39 P.3d 984 (2002).
[21] *Washington Waste Sys. v. Clark County,* 115 Wn.2d 74, 79, 794 P.2d 508 (1990).

Powers would be cast aside. As a result, Washington Courts have consistently expressed their concern for these separation of powers issues:

> Any attempt by the Legislature to contravene retroactively this Court's construction of a statute 'is disturbing in that it would effectively be giving license to the Legislature to overrule this Court, raising separation of powers problems.[22]

To that end, the Washington Supreme Court has ruled that even a clarifying enactment cannot be applied retrospectively when it contravenes a construction placed on the original statute by the judiciary.[23] Here, Cambridge argues that the Legislature specifically amended RCW 23B.14.340 to "clarify" that post-dissolution claims are preserved against corporations in reaction to the Washington Court of Appeals' decision in *Ballard Square*. A retroactive application of SB 6596 would contravene this court's opinion in *Ballard Square* and would violate Washington's Constitution. Therefore, the court can only apply SB 6596 prospectively to avoid violating the doctrine of separation of powers.

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[22] *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997).
[23] *Washington Waste Sys. v. Clark County*, 115 Wn.2d 74, 79, 794 P.2d 508 (1990).

B. THE INDEMNITY AGREEMENT DOES NOT COVER DAMAGES CAUSED BY CONSTRUCTION DEFECTS.

1. The indemnity clause must be construed as a whole.

Our Supreme Court established the basic rules of contract interpretation in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). Contracts of indemnity are subject to the same rules of construction governing other contracts, i.e., the intent of the parties controls.[24] The intent of the parties to a contract is determined not only from the actual language of the agreement, but also from "viewing the contract as a whole, the subject matter and objective of the contract, all of the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties".[25] Contracts for indemnity are interpreted narrowly in favor of the indemnitor.[26]

Cambridge's entire argument is focused on the general language in the indemnity agreement which begins with "all claims, action and damage of whatsoever kind or nature". Cambridge completely ignores the phase **"and subject to the limitations**

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[24] *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).
[25] *Id.*
[26] *Jones v. Strom Construction Co., Inc.*, 84 Wn.2d 518, 521, 527 P.2d 1115 (1974).

provided below" and the remaining five paragraphs of the indemnity clause. The indemnity clause must be read as a whole and can not be limited to only the first paragraph, with the remaining five paragraphs which limit the duty to indemnify to tort claims rendered meaningless. .

The specific language of the indemnity clause controls over the general language.[27] The specific language of the indemnity agreement makes it clear that it does not apply to defects in workmanship unless those defects cause bodily injury or damage to property. A reasonable interpretation of the entire indemnity clause is that the general indemnity clause applies to any and all losses or liabilities to or by third-parties for damages arising out of bodily injury to persons or damages to property. This litigation involves a breach of contract claim for construction defects, and not a tort claim for bodily injury or property damage caused by the Corporation's negligence. Washington does not recognize a cause of action for negligent construction.[28] The fact that the indemnity clause tracks almost verbatim the wording of Washington's anti-

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[27] Restatement Second of Contracts § 236 (1981).
[28] *Atherton Condominium Apartment-Owners Ass'n Bd. Of Directors v. Blume Development Co.*, 115 Wn.2d 506, 526, 799 P.2d 250 (1990).

indemnity statute, RCW 4.24.115, is another indication that it only applies to tort actions.

This same general indemnity language was found to be ambiguous in *Jones v. Strom Construction Co., Inc.*, 84 Wn.2d 518, 521, 527 P.2d 1115 (1974). Here, the general language in the indemnity agreement is ambiguous not only for the reasons discussed in *Jones*, but also because it contains the additional phrase "to the fullest extent permitted by law and subject to the limitations provided below" and five additional paragraphs limiting the duty to indemnify to tort claims. Like *Jones*, since Cambridge drafted and required the Master Agreement containing the indemnity clause, the doubt created by the ambiguity should be resolved against Cambridge.

2. The indemnity clause only applies to tort claims and does not cover claims for economic loss caused by a breach of contract.

The indemnity clause limits the duty to indemnify to only those "damages arising from injury to persons or damages to property" that are caused by or result from the concurrent "negligence" of Cambridge and the Corporation, and then only to the extent of the "negligence" of the Corporation. The trial court noted that the indemnification provision contains no language or

provisions indicating an intent to include contract-based claims as a "trigger" to the indemnity obligations. This lack of intent is evidenced in the restrictive indemnification language which states that the duty to indemnify "shall only apply to the extent of negligence of Subcontractor." The language of the indemnification only addresses claims or losses related to "bodily injury" or "damages to property" caused by or resulting from the negligence of the Corporation.

This litigation involves a breach of contract claim, and not a tort claim for bodily injury or property damage. A construction defect is not "damage to property." These words refer to sudden damage, not the gradual deterioration caused by allegedly defective workmanship. Construction defects are inherent in the product, which adversely affects the quality and value when complete. The harm is inherent in the product rather than caused by subsequent damage.[29] Here, Cambridge's claims for economic loss from construction defects are not "property damage" under the indemnity agreement. In *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987), the court held that defects in construction give rise purely to contractual

[29] *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987).

claims, and are not the type of damages that arise from tort-based physical injury or property damage.[30]

Cambridge claims that because the HOA brought claims against the "Declarant", for breach of implied warranties under the Washington Condominium Act, it should be allowed to seek indemnity of these "tort based" claims under the indemnity agreement. The Washington Condominium Act and its implied warranties only apply to the Declarant, Cambridge. Cambridge's breach of contract claim against the Corporation is not based on the implied warranties under the Washington Condominium Act. The HOA's claims concern the quality of construction, not injury to persons or damages to property. The indemnity clause does not cover damages caused by Cambridge's breach of its implied warranties under the Washington Condominium Act.

3. The Court in *MacLean* misinterpreted the indemnity clause.

In *MacLean Townhomes, LLC v. American 1st Roofing & Builders, Inc.*, 133 Wn. App. 828, 138 P.3d 155 (2006), the court interpreted the general language in the first paragraph of the indemnity clause independently of the remaining five paragraphs

[30] *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 417, 420-422, 745 P.2d 1284 (1987).

and found that the indemnity clause covers any and all damages suffered by the indemnitee, including economic damages caused by construction defects, regardless of whether the loss arises from, results from or is connected with the indemnitor's breach of its contractual duties. The Court of Appeals' interpretation of the indemnity clause virtually casts a subcontractor into the role of an **insurer** of the Declarant/Developer/General Contractor's separate statutory duties under Washington's Condominium Act, its contractual obligations to the Homeowners, its separate contractual obligations as a Developer/General Contractor, and the breach of contract by another subcontractor.

The court in *MacLean* improperly relied on *Karnatz v. Murphy Pacific Corp.*, 8 Wn. App. 76, 503 P.2d 1145 (1972) (quoting *Tucci & Sons, Inc. v. Carl T. Madsen, Inc.*, 1 Wn. App. 1035, 467 P.2d 386 (1970)), to support its broad all inclusive interpretation of the general language of the indemnity clause. In *Tucci*, the court interpreted an indemnity clause which contained only the first paragraph of the indemnity clause in this case in a negligence action. In *Tucci*, the court held that the subcontractor was bound to indemnify the contract for losses even though the loss had been occasioned solely by the negligence of the

contractor.[31] This precedent was relied upon by the court in *Karnatz* to hold that Westinghouse had a *duty to defend* Wright. *Karnatz* did not address the duty to indemnify.

Tucci was overruled by our Supreme Court in *Jones*. In *Jones*, the court specifically rejected *Tucci*'s and *MacLean's* interpretation of the same general indemnity clause. The court considered a general indemnity provision which covered damages "arising out of, in connection with, or incident to the indemnitor's performance of the contract".[32] The indemnity clause in *Jones* did not contain the phrase "subject to the limitations provided below" or the additional five paragraphs in the indemnity clause at issue in this case. The court concluded that the indemnity clause was ambiguous and did not give rise to a duty to indemnify.[33] This holding was subsequently affirmed in *Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 649 P.2d 836 (1982), on the basis of an identical indemnity provision.

The *MacLean* court's interpretation of the general language of the indemnity clause directly contradicts the Supreme Court's decisions in *Jones* and *Brame*. The *MacLean* court's interpretation

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[31] *Tucci & Sons, Inc. v. Carl T. Madsen, Inc.*, 1 Wn. App. 1035, 1038, 467 P.2d 386 (1970).
[32] *Jones*, 84 Wn.2d at 521.
[33] *Jones*, 84 Wn.2d at 521-22.

of the indemnity agreement virtually casts the Corporation as an insurer against any and all losses or damages occurring to Cambridge, regardless of whether the loss or damages are caused by a breach by the Corporation of the express terms of its subcontract. The general language of the indemnity agreement ties the losses to claims 'arising from,' or 'resulting from' or 'connected with' the Corporation's performance under the subcontract. Even if the indemnity clause covers economic damages caused by a breach of contract, there must be a causal connection between a breach by the Corporation of the express terms of its subcontract and the loss to Cambridge. Cambridge failed to show any breach by the Corporation of its contractual duties under the express subcontract.

Washington, like the majority of states, has enacted a statute that invalidates exculpatory clauses in indemnity agreements in construction contracts. RCW 4.24.115 limits the enforceability of indemnity clauses in the context of construction contracts. Under RCW 4.24.115, the indemnitor may not indemnify the indemnitee for indemnitor's sole negligence.[34] Moreover, in cases of concurrent negligence of the indemnitor and the indemnitee, the

[34] RCW 4.24.115(1).

indemnitor only has a duty to indemnify the indemnitee to the extent of the indemnitor's negligence, and only if expressly stated in writing.[35] The *MacLean* court's interpretation of the indemnity clause violates the public policies expressed by the Washington Legislature under RCW 4.24.115. Regardless of the context, indemnity clauses which do not expressly limit recovery for the indemnitor's own breach of contract and purport to indemnify the indemnitee against any and all claims so long as they have some connection with the indemnitor's work, should be found void as against public policy.

C. CAMBRIDGE HAS NO DAMAGES TO SUPPORT ITS BREACH OF CONTRACT CLAIM SEPARATE AND APART FORM ITS INDEMNITY CLAIM.

Cambridge's only damages are the amounts it allegedly paid to the HOA in settlement. A breach of contract and a breach of indemnity claim are two separate and distinct causes of action.[36] In order to support a separate cause of action for breach of contract, Cambridge must prove both a breach and damages sustained as a direct and proximate result of the alleged breach of contract.[37] Here, Cambridge's claim is simply an indirect attempt to obtain

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[35] RCW 4.24.115(2).

[36] *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 946 P.2d 760 (1997).

[37] *Lee v. Bergsten*, 58 Wn.2d 462, 364 P.2d 18 (1961).

indemnity. In *Fisons*, the plaintiff sued her physician and drug company. The physician's insurance company settled with Plaintiff and then sued the drug company under the CPA to recover the amount it paid in that settlement.[38] The drug company then settled with the patient. The *Fisons* court held that to allow the insurance company to bring a consumer protection action against Fisons for what is in reality contribution or indemnity would be to allow an "end-run" around the tort reform act (RCW 4.22).[39] The *Fisons* court reversed the trial court's granting of Durham & Bates' summary judgment on its CPA and equitable indemnity claims.

Although *Fisons* involved the issue of whether a CPA claim was an indemnity claim in disguise, the same principle applies here. Cambridge's primary relief sought on its breach of contract claim is not compensation for construction work, but indemnity for construction defect losses. Washington law requires a separate written indemnity agreement to support a cause of action for indemnity.[40] If Cambridge is entitled to recover the same damages they sought under its indemnity claim under a separate breach of contract theory, then there is no reasonable basis under

[38] *Fisons*, 122 Wn.2d at 323.
[39] *Fisons*, 122 Wn.2d at 324.
[40] *Urban Development v. Evergreen Building Products*, 114 Wn. App. 639, 644-645, 59 P.3d 112 (2003).

Washington law to require a separate written indemnity agreement to support a cause of action for indemnity. The court should treat the breach of contract claim according to its characteristics, not its label. To allow Cambridge to bring a breach of contract claim against the Corporation for what is in reality indemnity would be to allow it to recover for implied or equitable indemnity, which is not recognized under Washington law.[41]

Given that Cambridge's only damages are for the amounts it allegedly paid the HOA as settlement, its breach of contract claim has all of the characteristics of an indemnity claim and must be dismissed.

D. THE CORPORATION IS NOT LIABLE FOR THE SOLE PROPRIETORSHIP'S DEBTS OR LIABILITIES.

1. The sole proprietorship's debts and liabilities to Cambridge were discharged in bankruptcy.

The "Agreement of Subcontract" between Cambridge and the Corporation is only for Phase III. The Corporation did perform some limited repairs on Phase I and II pursuant to separate Purchase Orders. (CP 1445-1453 and CP 1857-58). None of the alleged defects involve the minor repairs performed by the Corporation.

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[41] *Urban Development v. Evergreen Building Products*, 114 Wn. App. 639, 644-645, 59 P.3d 112 (2003).

What Cambridge is attempting to do is hold the Corporation liability for the sole proprietorship's work on Phase I and II under a breach of contract theory. Such reasoning, however, is inherently flawed. The Corporation was not a party to the sole proprietorship's subcontract. In fact, the Corporation was not even formed as a legal entity until long after the sole proprietorship had completed its work on Phase II. Cambridge has not provided any legal basis to support its argument that the Corporation is contractually liable for the sole proprietorship's work.

The Corporation can not be found liable under any legal theory for the sole proprietorship's work on Phase I and Phase II, because the sole proprietorship received a discharge in bankruptcy. Under 11 U.S.C. § 727(b), a bankruptcy order discharges the debtors from all debts arising prior to the order. Furthermore, 11 U.S.C. § 524(a) (Supp.1989) prohibits collection efforts on those debts. Cambridge Townhomes, LLC was a named creditor in bankruptcy. All debts or liabilities that the sole proprietorship may have had to Cambridge relating to its work on the Project were discharged in bankruptcy. Under 11 U.S.C. § 524(a), Cambridge is prohibited from pursuing any claims against the sole proprietorship for its work on the Project.

Contrary to Cambridge's assertion, the Bankruptcy Court's Order only allowed it to pursue claims against the *Corporation* to the extent of any insurance coverage, not the sole proprietorship. Cambridge's Motion filed in the Bankruptcy Court states that "a separate lawsuit has now been filed by Polygon under King County Superior Court cause number 04-2-06304-3SEA to recover sums paid out to the HOA from the responsible subcontractors, **including Debtor P.J. Interprize**" and that Polygon has asserted claims against the Debtor for breach of contract and indemnity. (CP 278-279). Cambridge's Motion for Relief from Stay pertained only to the Corporation since it is the only party named in King County Superior Court cause number 04-2-06304-3SEA. Polygon never filed a motion seeking relief from the automatic stay to pursue claims against the sole proprietorship. In fact, the Bankruptcy Court denied Polygon's previous motion for relief from stay to pursue claims against Gerald Utley d/b/a P.J. Interprize personally, even though Polygon claimed it was only seeking recover from the sole proprietorship's insurer. (CP 2284-2289).

2. Cambridge did not assert a claim for successor liability, and even if it had, the doctrine does not apply.

Cambridge's Complaint does not assert a claim for successor liability against the Corporation, and Cambridge never sought to amend its Complaint to assert such a claim. Even if it had, the successor liability doctrine does not apply for several reasons. The traditional rule of successor liability has been that a *corporation* that buys the assets of another *corporation* **does not** take the liabilities of that corporation.[42] This is not a case where a corporation purchased the assets or merged with another corporation. The stockholders and directors of the Corporation did not expressly or impliedly agree to assume the liabilities of the sole proprietorship. There was no merger, transfer of assets, or change of stock. There is no evidence of a purchase by the Corporation of the sole proprietorship. The sole proprietorship simply ceased doing business.

Under the "mere continuation" exception to the general rule, a corporation is not to be considered a continuation of the predecessor *corporation* unless, after the transfer of assets, only one corporation remains, and there is an identity of stock,

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[42] *Hall v. Armstrong Cork, Inc.*, 103 Wn.2d 258, 261-62, 692 P.2d 787 (1984).

stockholders, and directors between the two corporations.[43] The sole proprietorship did not have any stock, stockholders or directors, and there is no identity of stock, stockholders and directors between the sole proprietorship and the Corporation.

Further, because the sole proprietorship's debts and liabilities to Cambridge were discharged in bankruptcy, the Corporation could not have succeeded to the sole proprietor's discharged debts and liabilities. Cambridge has no viable claim against the Corporation for successor liability.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING CAMBRIDGE'S MOTION TO AMEND ITS COMPLAINT.

More than a year and eight months after originally filing its Complaint, and only one month before trial, Cambridge sought leave to amend its Complaint to add the sole proprietorship as a party. In reviewing trial court's decision to grant or deny leave to amend pleadings, the appellate court applies a manifest abuse of discretion test.[44] The trial court's decision should not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable

[43] *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 174-175 (1985).
[44] CR 15(a).

grounds, or for untenable reasons.[45] A court should consider four factors in deciding whether to grant leave to amend: "bad faith, undue delay, prejudice to the opposing party, and the futility of the amendment.[46] The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party.[47]

Here, Cambridge presented no valid reason for its failure to name the sole proprietorship in the original Complaint, which was filed 20 months earlier. New parties may not be added under CR 15(c) if the plaintiff's delay is due to inexcusable neglect.[48] Inexcusable neglect exists when no reason for the initial failure to name the party appears in the record.[49] In this case, there was no honest or understandable mistake in failing to name Gerald Utley d/b/a P.J. Interprize as a defendant. Cambridge was obviously aware that the sole proprietorship contracted for work on Phase II. It was only after the court ruled that the Corporation is not liable for

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[45] *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).
[46] *See, Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1998).
[47] *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 350, 670 P.2d 240 (1983).
[48] *Stansfield v. Douglas County*, 107 Wn. App. 20, 26 P.3d 935, aff'd, 146 Wn.2d 116, 123, 43 P.3d 498 (2002).
[49] *S. Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 78, 677 P.2d 114 (1984).

the sole proprietorship's work that Cambridge filed the motion to amend one month before trial. There is no reasonable basis for Cambridge's failure to name Gerald Utley as a defendant.

Moreover, Cambridge filed its motion to amend on the eve of trial, after the discovery cutoff date had passed, and after all depositions had been taken. Unfair surprise is a factor which may be considered in determining whether permitting amendment would cause prejudice.[50] Cambridge incorrectly asserts that Gerald Utley will not be prejudiced by the amendment because the Corporation's counsel and its expert investigated Phase II. However, the Corporation's counsel can not have represented the sole proprietorship in this action. It would be a direct conflict of interest for the Corporation's counsel to also represent Gerald Utley d/b/a P.J. Interprize in this action. If the motion had been granted, Gerald Utley and the sole proprietorship would have had to appoint its own counsel, retain its own experts, and conducted its own discovery, which would have been impossible because the discovery cutoff date had passed and trial was only a month away.

Further, it is beyond doubt that allowing Cambridge to amend its Complaint to name the sole proprietorship would be futile

[50] *Herron*, 108 Wn.2d at 165-166, 736 P.2d 249.

because Cambridge's claims against the sole proprietorship were barred by the six year statute of limitations on written contracts. Construction on Phase II was substantially complete by October 1, 1999. Under RCW 4.16.310, Cambridge had to file its claim against the sole proprietorship by October 1, 2005. Thus, Cambridge's claims against the sole proprietorship were already time barred.

Finally, as previously discussed, Cambridge did not obtain permission from the Bankruptcy Court to pursue claims against the sole proprietorship. Cambridge's prior motion for leave of stay pertained only to the Corporation. The Bankruptcy Court denied Polygon's previous motion to obtain leave of the stay to pursue claims against the sole proprietorship. The Bankruptcy Code does not allow Cambridge to proceed against the sole proprietorship because all debts and any liability on the claim were discharged, and its insurer has no continuing contractual obligation to pay any damages that Cambridge may prove. This issue was squarely addressed *In re Lundberg*, 152 B.R. 316 (Bankr. E.D. Okla.1993). In *Lundberg*, the Resolution Trust Corporation sought leave to continue to prosecute an action against the debtor "in name only" in hopes of collecting from his liability insurance carrier. The

bankruptcy court noted that the insurer was only obligated to pay on the policy when the insured debtor is deemed to be "legally liable for damages." Considering that the Debtor insured had been discharged of personal liability on the claim, the court held that the Debtor insured can never become 'legally liable for damages,' under 11 U.S.C. § 524(a)(2).[51] The court recognized existing case law stating that § 524(e) permits a determination of the liability of the Debtor for recovery against the Debtor's insurer. However, the court found that the legislative history does not support this reasoning. Co-debtors and guarantors under the provision of §524(e) are charged with the primary liability of a debt along with the maker of the obligation and may be sued under a direct action to recover on that particular debt. The court in *Lundberg* recognized that a liability insurer is only liable if the insured is deemed to be liable and that the insurer could never become responsible to pay under the terms of its policy.[52] The court was unpersuaded by the cases that attempt to distinguish between personal liability and a determination of liability simply for the purpose of permitting recovery from the insurer. The court ruled that the bankruptcy proceedings extinguished the debt and the

[51] *In Re Lundberg*, 152 B.R. 316, 318 (1993).
[52] *In Re Lundberg*, 152 B.R. 316, 319 (1993).

insurer was not liable and dismissed the case against the Debtor. Like *Lundberg*, Cambridge has no right to bring an action against the sole proprietorship. Cambridge can not sit idly by for years and try to amend its Complaint on the eve of trial to add the sole proprietorship just so it can attempt to recover against its liability insurance carrier.

Lastly, this issue is moot since on November 29, 2005, Cambridge and Polygon filed a separate lawsuit against the sole proprietorship. (See Appendix C). The trial court did not abuse its discretion in denying Cambridge's motion to amend its Complaint.

F. CAMBRIDGE HAS THE BURDEN OF PROVING WHAT DEFECTS ARE LATENT.

Cambridge does not appeal the trial court's ruling that the Corporation's liability is limited to those defects which are latent. Instead, Cambridge appeals the trial court's ruling that it has the burden of proving those defects which are alleged to be latent.

In a construction contract, if an alleged defective condition is known, visible, or readily discoverable, and the work is accepted, waiver exists.[53] Where one party to a construction contract has a right to inspect the other party's work performed under the contract before payment, and that right is exercised, then the making of full

[53] *See Brodeck v. Farnum*, 11 Wash. 565, 40 P. 189 (1895).

payment without objection is a waiver of any claim for damages.[54] Here, the trial court found that Cambridge inspected the work of the Corporation during construction, and accepted the work as in conformance with the contract, the plans, industry standards, and building code at the time of construction. Thus, the trial court ruled Cambridge waived its right to seek damages against the Corporation for any defects which were known or visible during construction, i.e. patent defects. Cambridge does not appeal this decision.

Cambridge confuses the issue of whether the Corporation had the burden of proving waiver in the underlying motion, which it obviously did, and Cambridge's burden of proof on the breach of contract and indemnity claims. Given the trial court's ruling that the Corporation is not liable for patent defects, Cambridge has the burden of proving what defects were latent in order to recover on its claims. Obviously, the burden of proof is not upon the Corporation to show any latent defects in the performance of its own work.

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[54] *Id.*

G. THE TRIAL PROPERLY STRUCK PORTIONS OF MARK JOBE'S DECLARATION WHICH WERE ENTIRELY SPECULATIVE.

Cambridge attempted to introduce the declaration of Mark Jobe on the issue of whether Cambridge's superintendent's could have inspected the vinyl siding, weather resistive barrier, flashings and trim during the construction of the Project. The trial court properly struck Mr. Jobe's statements under ER 703. The trial court has wide discretion in ruling on the admissibility of expert testimony.[55] This court should not disturb the trial court's ruling "{i}f the reasons for admitting or excluding the opinion evidence are both fairly debatable..."[56]. The facts and data which may support an expert's opinion are delineated in ER 703. Mr. Jobe is not qualified to testify on this issue and his opinions are based on speculation. Since 1992, Mr. Jobe has not been involved in the construction of any buildings and has never constructed any multi-family residences or condominiums. Mr. Jobe was not present during the construction of this Project and never spoke with any of Cambridge's superintendents or foreman concerning the Project.

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[55] *State v. Fagundes*, 26 Wn. App. 477, 483, 614 P.2d 198, 625 P.2d 179, *review denied*, 94 Wn.2d 1014 (1980).
[56] *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 572, 719 P.2d 569 (1986)

The trial court properly excluded Mr. Jobe's testimony because he has no experience in construction of condominium projects such as Cambridge and his opinions of what Cambridge's superintendents could see during construction is speculative and without factual basis.

H. THE CORPORATION IS ENTITLED TO ITS ATTORNEY'S FEES AND COSTS INCURRED IN THE *DEFENSE* OF THE INDEMNITY CLAIM AND UNDER RAP 18.1.

Although the subcontract does not contain a separate prevailing attorney fee clause, the indemnity clause provides that should any dispute arise with respect to the applicability and/or interpretation of the rights to indemnification, the prevailing party shall be entitled to recover its reasonable attorney fees and costs in addition to any other remedy. The Corporation prevailed on the indemnity claim and the trial court properly awarded it fees and costs incurred in ***defending*** the indemnity claim only.

Under RAP 18.1(a), if the Corporation prevails on appeal, it is entitled to an award of its defense costs which relate to the indemnity claim.

I. CAMBRIDGE IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW AND THERE IS NO PREVAILING ATTORNEY FEE CLAUSE IN THE SUBCONTRACT.

Cambridge did not move for summary judgment below and is not entitled to a judgment as a matter of law on appeal on its

indemnity claim against the Corporation. There has been no factual determination of whether the Corporation breached its subcontract and owes any duty to indemnify Cambridge.

Further, Cambridge is not entitled to attorney's fees and costs on appeal because there is no prevailing attorney fee clause in the subcontract. In order to recover fees, the party must show the existence of a contract, statute or equity entitling the requesting party to such fees.[57] Cambridge misconstrues the nature and intent of the defense/indemnity provision. The purpose of such a provision is to defend the indemnitee against the claims of *third parties*.[58] Even if Cambridge prevails on appeal, it is not entitled to recover its fees incurred to establish its right to indemnity. These are not defense costs. Since there is no prevailing party attorneys fees provision, Cambridge is not entitled to its fees and costs on appeal.

V. CONCLUSION

For the foregoing reasons, P.J. Interprize, Inc. respectfully requests that the Court affirm the trial court's dismissal of

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[57] *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).
[58] *See generally Tri-M Erectors v. Donald M. Drake Co.*, 27 Wn. App. 529, 618 P.2d 1341 (1980).

Appellants Cambridge Townhomes, LLC's and Polygon Northwest Company's claims against P.J. Interprize, Inc.

DATED this 22 day of September, 2006.

OLES MORRISON RINKER & BAKER LLP

By _____
Eileen I. McKillop, WSBA 21602
Attorneys for Respondent P.J. Interprize, Inc.

P-APPELLATE BRIEF 094940034.doc

APPENDIX

A. Cambridge Townhomes Homeowners Association's Complaint against Cambridge Townhomes, LLC, et al, filed on December 22, 2003, King County Superior Court Cause No. 03-2-12717-5SEA.

B. Stipulated Motion and Order for Dismissal of all Plaintiff's Claims filed on July 27, 2004, King County Superior Court Cause No. 03-2-12717-5SEA.

C. Cambridge Townhomes, LLC's and Polygon Northwest Company's Complaint against Gerald Utley d/b/a PJ Interprize, filed on November 29, 2005, King County Superior Court Cause No. 05-2-38551-1KNT.

APPENDIX A

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

CAMBRIDGE TOWNHOMES HOMEOWNERS ASSOCIATION, a Washington corporation,

Plaintiff,

v.

CAMBRIDGE TOWNHOMES, LLC, a Washington limited liability company; POLYGON NORTHWEST COMPANY, a Washington general partnership; BRENTVIEW, INC., a Washington corporation and general partner; ARMADILLO INVESTMENTS, a Washington general partnership and general partner,

Defendants.

No. 03-2-12717-5SEA

SUMMONS ON COMPLIANT

THE STATE OF WASHINGTON, TO DEFENDANTS:

A lawsuit has been started against you in the above-entitled court by Cambridge Townhomes Homeowners Association, plaintiff. This claim is stated in the written Complaint for Condominium Act, a copy of which is served upon you with this Summons.

STAFFORD FREY COOPER
PROFESSIONAL CORPORATION
601 Union Street, Suite 3100

In order to defend against this lawsuit, you must respond to the Complaint by stating your defense in writing, and by serving a copy upon the person signing this Summons within twenty (20) days after the service of this Summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where plaintiff is entitled to what has been asked for because you have not responded. If you serve a notice of appearance on the undersigned person, you are entitled to a notice before a default judgment may be entered.

You may demand that the plaintiff file this lawsuit with the Court. If you do so, the demand must be in writing and must be served upon the person signing this Summons. Within fourteen (14) days after you serve the demand, the plaintiff must file this lawsuit with the Court, or the service on you of this Summons and Complaint will be void.

If you wish to seek the advice of an attorney on this matter, you should do so promptly so that your written response, if any, may be served on time.

THIS SUMMONS is issued pursuant to Rule 4 of the Superior Court Civil Rules of the State of Washington.

DATED this 22nd day of December, 2003.

STAFFORD FREY COOPER

By _____
David J. Onsager, WSBA# 21806
Scott D. Bissell, WSBA #26416
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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

CAMBRIDGE TOWNHOMES HOMEOWNERS ASSOCIATION, a Washington corporation,

Plaintiff,

v.

CAMBRIDGE TOWNHOMES, LLC, a Washington limited liability company; POLYGON NORTHWEST COMPANY, a Washington general partnership; BRENTVIEW, INC., a Washington corporation and general partner; ARMADILLO INVESTMENTS, a Washington general partnership and general partner,

Defendants.

No. 03-2-12717-5SEA

COMPLAINT FOR BREACH OF CONDOMINIUM ACT, BREACH OF IMPLIED WARRANTY OF HABITABILITY, MISREPRESENTATION, FRAUDULENT CONCEALMENT, BREACH OF FIDUCIARY DUTY, AND VIOLATION OF CONSUMER PROTECTION ACT

I. PARTIES

1.1 Plaintiff Cambridge Townhomes Homeowners Association (hereafter "Association") is a Washington nonprofit corporation located in King County, Washington, and is authorized to maintain this lawsuit pursuant to recorded

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Declarations and Washington State law, including but not limited to Chapters 64.32 and 64.34 of the Revised Code of Washington. The Cambridge Townhomes are a condominium complex ("Complex") located in King County, Washington. The Association seeks recovery for damage to common areas, limited common areas and individual units of the Complex.

1.2 Defendant Cambridge Townhomes, LLC ("Cambridge") is a Washington limited liability company with its principal place of business in King County, Washington. Cambridge was the developer and declarant of the Complex.

1.3 Defendant Polygon Northwest Company ("Polygon") is a Washington general partnership with its principal place of business in King County, Washington. Polygon is the Manager of Cambridge.

1.4 Defendant Brentview, Inc. ("Brentview") is a Washington corporation with its principal place of business in King County, Washington. It is the Managing General Partner of Polygon.

1.5 Upon information and belief, defendant Armadillo Investments ("Armadillo") is a Washington general partnership with its principal place of business in King County, Washington. Upon information and belief, it is a general partner of Polygon.

1.6 The Association is informed and believes that Polygon, Brentview and Armadillo are the alter ego of Cambridge for the following nonexclusive reasons:

a. They have commingled assets;

b. They have transferred funds between themselves with no substantial business purpose;

c. They have allowed the staff and other assets of one or more of them to be used by one or more of the other alter egos without

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adequately compensating the other alter ego whose staff and other assets have been used;

d. Each alter ego entity treated the assets of the other alter ego entities as its own;

e. The alter ego entities failed to maintain proper or adequate records;

f. The equitable ownership of the alter ego entities was in the same person or entity;

g. There was a similarity in the officers, directors and supervising employees of the alter ego entities;

h. Carrara and Buchan were not adequately capitalized and/or there is an absence of substantial assets in both;

l. The alter ego entities were shells, instruments or conduits for the conduct of a single venture or business;

j. The alter ego entities failed to maintain arms' length relationships with one another; and

k. It would be unjust and inequitable to allow the alter ego entities to use their purported separate status as a shield to insulate them from the liability obligation of Carrara.

1.7 Hereinafter Cambridge, Polygon, Brentview and Armadillo shall be referred to collectively as "Developer Defendants."

II. JURISDICTION AND VENUE

2.1 This court has jurisdiction over this matter because the Complex and the property damage thereto are located within the State of Washington.

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2.2 Venue is proper as the Developer Defendants transact business in King County, Washington and have their principal places of business in King County, Washington.

III. FIRST CAUSE OF ACTION
BREACH OF IMPLIED WARRANTY UNDER WASHINGTON CONDOMINIUM ACT

3.1 Pursuant to Section 64.34.445 of the Washington Condominium Act, the Developer Defendants impliedly warranted that the units, common areas and limited common areas in the Complex were suitable for the ordinary uses of real estate of that type. In addition, the Developer Defendants impliedly warranted that the improvements made or contracted for by the Developer Defendants were free from defective materials and were constructed in accordance with sound engineering and construction standards, and in a workmanlike manner in compliance with then applicable law.

3.2 The Developer Defendants breached their implied warranties in that there are defects in the Complex, including, but not limited to, the following:

a. A variety of building envelope defects and other deficiencies in building envelope components (including the exterior cladding, flashing, roof, decks, and windows) and/or their installation;

b. A variety of deficiencies at and around the Complex grounds; and

c. Building Code and/or other applicable code violations.

In addition, there may be other defective conditions within the Complex that have yet to be discovered.

3.3 As a consequence of the defects described above, there has been water intrusion into and through the building envelope, exterior and interior building surfaces have deteriorated prematurely, and various building components and other property have been physically damaged, and their useful lives shortened.

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3.4 As a direct and proximate result of the Developer Defendants' conduct, the Association and its unit owners have been damaged in an amount to be proven at trial. Such damage, includes but is not limited to, the cost of correcting the defective conditions and repairing the resultant damage, investigative costs, and the loss of use and marketability of the units.

3.5 Pursuant to RCW 64.34.455, the Association is entitled to its attorneys' fees incurred in seeking repair of the defective conditions and resultant damage and in prosecuting this action.

IV. SECOND CAUSE OF ACTION
BREACH OF IMPLIED WARRANTY OF HABITABLITY

4.1 Under Washington law, the Developer Defendants impliedly warranted that the units, common areas, and limited common areas of the Complex were habitable.

4.2 The Developer Defendants breached this implied warranty of habitability. The defects set forth in Paragraph 3.2 are serious and substantial, and severely restrict the habitability of the units in the Complex.

4.3 As a direct and proximate result of the Developer Defendants' conduct, the Association has been damaged in an amount to be proven at trial. Such damage, includes but is not limited to, the cost of correcting the defective conditions and repairing the resultant damage, investigative costs, and the loss of use and marketability of the units.

V. THIRD CAUSE OF ACTION
MISREPRESENTATIONS AND OMISSIONS IN PUBLIC OFFERING STATEMENT

5.1 Pursuant to RCW 64.34.405, the Developer Defendants were to provide each purchaser of a unit with a copy of the public offering statement.

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5.2 RCW 64.34.405(3) provides in pertinent part that, "The declarant or dealer shall be liable for any misrepresentation contained in the public offering statement or for any omission of material fact there from if the declarant or dealer had actual knowledge of the misrepresentation or omission or, in the exercise of reasonable care, should have known of the misrepresentation or omission."

5.3 The Developer Defendants omitted information from the Public Offering Statement concerning the defects alleged above.

5.4 The Developer Defendants had actual knowledge, or in the exercise of reasonable care should have known of the omission of information in the Public Offering Statement, related to the defects alleged above.

5.5 A budget was included in the public offering statement which stated the amounts necessary to maintain and repair the Complex, including the amount appropriate to be set aside for reserves.

5.6 The budget understated the amounts necessary to maintain and repair those areas that the Association has a duty to maintain and repair, understated the administrative costs, including the cost of legal services, and understated the appropriate amount to be set aside for reserves to cover said costs, including the costs of correcting the defects alleged above.

5.7 The Developer Defendants had actual knowledge, or in the exercise of reasonable care should have known, that the public offering statement misrepresented the amount of money necessary to maintain and repair those areas that the Association has a duty to maintain and repair, misrepresented the amount of money necessary to pay administration costs, including the cost of legal services, and misrepresented the amount of money necessary to be set aside for reserves to cover said costs, including the cost of correcting the defects alleged above.

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5.8 As a direct and proximate result of the conduct by the Developer Defendants, the Association has been damaged in an amount to be proven at trial, plus prejudgment interest, at a rate of twelve percent (12%) per annum.

VI. FOURTH CAUSE OF ACTION
FRAUDULENT CONCEALMENT

6.1 The Developer Defendants were the sellers of the units at the Complex.

6.2 The Developer Defendants omitted information from the marketing materials and purchase agreements concerning the defects alleged above.

6.3 The defects substantially reduce the Complex' value and were unknown to the Association members at the time of purchase.

6.4 The Developer Defendants had actual knowledge of the defects alleged above.

6.5 As a direct and proximate result of the conduct by the Developer Defendants, the Association has been damaged in an amount to be proven at trial

VII. FIFTH CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY

7.1 The Association has the responsibility, pursuant to the Declaration and the Washington Condominium Act, to maintain, repair and replace the common elements of the condominium. Pursuant to the Declaration, the Association also has the duty to repair, replace or restore damage to any part of the condominium.

7.2 For a period of time the Developer Defendants controlled the Association and had the duty to cause the Association to act in a reasonable and prudent manner and in the best interests of the unit owners to correct the defective conditions and to cause the on-going damage to the Complex to be repaired.

7.3 The Developer Defendants breached their fiduciary duties to the Association and the unit owners by failing to cause the correction of the defective

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conditions or the repair of the resulting damage to the Complex and/or by failing to provide adequate reserves in the Association's budget for the correction of defective conditions and the repair of the damage to the Complex.

7.4 As a direct and proximate result of the Developer Defendants' conduct, the Association has been damaged in an amount to be proven at trial. Such damages include, but are not limited to, the cost of correcting the defective conditions and repairing the resultant damage, investigative costs, and the loss of use and marketability of the units.

VII. SIXTH CAUSE OF ACTION
VIOLATION OF CONSUMER PROTECTION ACT

8.1 As set forth above, the Developer Defendants engaged in unfair and deceptive acts or practices in the conduct of trade or commerce which affect the public interest. The conduct of the Developer Defendants violated RCW 19.86.020.

8.2 As a direct and proximate result of the Developer Defendants' conduct, the Association has been damaged in an amount to be proven at trial. Such damages include, but are not limited to, the cost of correcting the defective conditions and repairing the resultant damage, investigative costs, and the loss of use and marketability of the units.

8.3 Pursuant to RCW 19.86.090, the Association and each of the purchasers of units from the Developer Defendants is entitled to recover the greater of treble damages or $10,000, plus attorneys' fees and costs.

PRAYER FOR RELIEF

The Association requests the following relief against the Developer Defendants:

1. For Judgment against the Developer Defendants on the Associations' claims.

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2. For an award of damages against the Developer Defendants in an amount to be proven at trial. Such damages include, but are not limited to, the cost of correcting the defective conditions and repairing the resultant damage, investigative costs, loss of use and marketability of the units, and attorneys' fees and costs incurred by the Association in seeking repair of the defective conditions and resultant damage and in prosecuting this action.

3. For such other and further relief as the court deems just and equitable.

DATED this 22nd day of December, 2003.

STAFFORD FREY COOPER

By _____
David J. Onsager, WSBA #21806
Scott Bissell, WSBA # 26416
Attorneys for Plaintiff
Cambridge Townhomes Homeowners Association

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APPENDIX B

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

CAMBRIDGE TOWNHOMES HOMEOWNERS ASSOCIATION, a Washington corporation,

Plaintiff,

v.

CAMBRIDGE TOWNHOMES, LLC, a Washington limited liability company; POLYGON NORTHWEST COMPANY, a Washington general partnership; BRENTVIEW, INC., a Washington corporation and general partner; ARMADILLO INVESTMENTS, a Washington general partnership and general partner,

Defendants.

No. 03-2-12717-5 SEA

STIPULATED MOTION AND ORDER FOR DISMISSAL OF ALL PLAINTIFF'S CLAIMS

~~(PROPOSED)~~

CLERK'S ACTION REQUIRED

STIPULATION

COME NOW Plaintiff CAMBRIDGE TOWNHOMES HOMEOWNERS ASSOCIATION and the above-captioned Defendants in this matter, and hereby jointly move the Court for an order dismissing all of Plaintiff's claims in this case, as the stipulating parties have reached a settlement.

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By _____
David J. Onsager, WSBA #21806
Attorneys for Plaintiff

By _____
Jeff Daly, WSBA # 26915
Attorneys for Defendants

ORDER

The court having considered the stipulated motion of the parties, and being otherwise fully advised on the merits, it is hereby

ORDERED that all claims in this matter are dismissed with prejudice and without costs to any party. The case is dismissed.

Done in this 26 day of July, 2004.

Judge

JUDGE TERRY LUKENS

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APPENDIX C

FILED
05 NOV 29 PM 4:30
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

Honorable Charles W. Mertel

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CAMBRIDGE TOWNHOMES, LLC, a Washington limited liability company; POLYGON NORTHWEST COMPANY, a Washington general partnership,

Plaintiff(s),

v.

GERALD UTLEY D/B/A PJ INTERPRIZE, a Washington sole proprietorship; P.J. INTERPRIZE, INC., a Washington corporation as successor-in-interest to GERALD UTLEY D/B/A PJ INTERPRIZE,

Defendant(s).

NO. 05-2-38551-1 KNT

COMPLAINT

COME NOW CAMBRIDGE TOWNHOMES, LLC, a Washington limited liability company and POLYGON NORTHWEST COMPANY, a Washington general partnership (hereinafter collectively referred to as "Plaintiffs"), by and through their attorneys the law firm of Preg, O'Donnell & Gillett, and hereby allege and plead the following Complaint against the defendants:

ORIGINAL

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I. PARTIES

1.1 Plaintiff CAMBRIDGE TOWNHOMES, LLC is a Washington limited liability company authorized to do business in the State of Washington. Plaintiff CAMBRIDGE TOWNHOMES LLC has paid all taxes and fees and is authorized to bring this action.

1.2 Plaintiff POLYGON NORTHWEST COMPANY is a Washington general partnership authorized to do business in the State of Washington. Plaintiff POLYGON NORTHWEST COMPANY has paid all taxes and fees and is authorized to bring this action.

1.3 Defendant GERALD UTLEY D/B/A P.J. INTERPRIZE (hereinafter "P.J. Interprize") is a sole proprietorship doing business in Washington State. At all times material to this action, P.J. Interprize was a licensed contractor doing business in King County, Washington.

1.4 Defendant P.J. INTERPRIZE, INC. is a corporation formed under the laws of the State of Washington. At all times material to this action, P.J. Interprize, Inc. was a licensed contractor doing business in King County, Washington.

II. JURISDICTION AND VENUE

2.1 This Court has jurisdiction over the parties to this action, as well as the subject matter thereof, as the Cambridge Townhomes Condominium construction project which is the subject matter of this lawsuit was built in King County, Washington.

2.2 Venue is proper within King County.

III. FACTS

3.1 Plaintiffs were the developers and general contractors of a condominium project called the Cambridge Townhomes Condominium project (hereinafter "Cambridge project" or simply "the Project"). The Cambridge project is comprised of forty multi-unit buildings, and was constructed in three phases from late 1997 through mid-2000. Phase I was comprised of

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buildings numbered 1 – 10. Phase II was comprised of buildings numbered 11 – 31. Phase III was comprised of buildings numbered 32 – 41.

3.2 Pursuant to the Washington Condominium Act, an Association was formed at the Cambridge project called the Cambridge Townhomes Homeowners Association (the "HOA").

3.3 Subsequent to the completion of the project, the HOA brought to Polygon's attention claims of construction deficiencies. In cooperation with the HOA, Polygon conducted a thorough investigation of the claimed construction deficiencies with the assistance of a neutral expert, Mr. Mark Jobe.

3.4 Mr. Jobe prepared a report to Polygon and the HOA which set forth his opinions regarding various problems with the construction of the project. Mr. Jobe's report identified problems with the installation of the siding, framing, windows, decks, deck rails, deck coatings, insulation, and concrete, as well as other areas spelled out in greater detail in his report.

3.5 Polygon contacted the principals of various subcontractors whose work was implicated by the expert reports referenced hereinabove, including defendant Gerald Utley, and sought their participation in an effort to resolve the HOA's claims without litigation. Several of the subcontractors employed experts who conducted their own independent inspections of the Project.

3.6 Defendants hired Construction Defects Consulting (CDC) to participate in the investigation of the Cambridge project. CDC performed over a hundred openings at the project as part of its inspection.

3.7 Polygon's initial efforts to resolve the claims by the HOA without litigation were unsuccessful, and the HOA filed suit before this Court on December 22, 2003 under cause number 03-2-12717-5SEA.

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3.8 Polygon continued to seek assistance from certain subcontractor representatives, including Gerald Utley, in settling the claims by the HOA. Although some of the subcontractors engaged in discussions regarding the claims, no settlements of claims against any of the subcontractors were reached prior to Polygon's settlement with the HOA.

3.9 Shortly after the HOA filed their Complaint, plaintiffs were able to resolve the HOA's claims against them. A settlement agreement has been signed between the HOA and plaintiffs herein resolving all claims of construction deficiencies at the Cambridge project.

3.10 The settlement entered into between the HOA and plaintiffs herein renders plaintiffs' liability to the HOA fixed as of the date of that settlement agreement. Plaintiffs are entitled to seek damages from Gerald Utley d/b/a PJ Interprize, and PJ Interprize, Inc. (as a successor-in-interest) for that portion of the settlement with the HOA that relates to the work performed by Gerald Utley d/b/a PJ Interprize, including plaintiffs' fees and costs in defending the HOA's claims, as well as plaintiffs' fees and costs in pursuing the instant action.

IV. FACTS RELATING TO THE "*CAMBRIDGE I*" LITIGATION

4.1 On March 24, 2004, the plaintiffs herein filed a separate lawsuit naming various subcontractor entities as defendants, King County Superior Court Cause No. 04-2-06304-3 SEA. This earlier litigation will be referred to herein as "Cambridge I." The Cambridge I lawsuit was initially assigned to the Honorable Judge Julie Spector. Defendant in Cambridge I PJ Interprize, Inc. filed an Affidavit of Prejudice against Judge Spector, after which the Cambridge I case was transferred to the Honorable Judge Charles Mertel.

4.2 In the Cambridge I Complaint, Cambridge Townhomes LLC and Polygon Northwest Company made the following allegation against named defendant PJ Interprize, Inc.:

> "11.3 PJ Interprize signed an Agreement of Subcontract for the Cambridge Townhomes project on or about August 26, 1998. ..."

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The Agreement of Subcontract referenced pertained to work at "Phase II" of the Cambridge project.

4.3 In its Answer and Third Party Complaint to the Cambridge I Complaint, defendant therein PJ Interprize, Inc. responded as follows to that allegation:

"11.3 In answer to paragraph 11.3 of the Complaint, Defendant [PJ Interprize, Inc.] admits that it signed a document entitled 'Project Agreement of Subcontract' dated August 26, 1998."

As noted above, the 'Project Agreement of Subcontract' referenced in paragraph 11.3 of PJ Interprize, Inc.'s Answer pertained to Phase II of the Cambridge project.

4.4 Contrary to the admission in its Answer, PJ Interprize, Inc. later filed pleadings in Cambridge I which indicated that it did not sign the 'Project Agreement of Subcontract' dated August 26, 1998. PJ Interprize, Inc. argued in motions filed in Cambridge I that the entity which signed the 'Project Agreement of Subcontract' dated August 26, 1998 was actually the sole proprietorship, Gerald Utley d/b/a PJ Interprize.

4.5 PJ Interprize, Inc. filed a Third Party Complaint in Cambridge I against sub-subcontractors to PJ entities who had performed work at the Cambridge project.

4.6 In its Third Party Complaint in Cambridge II, PJ Interprize, Inc. sued sub-subcontractors to PJ entities who had performed work on Phases II and III at the Cambridge project.

4.7 PJ Interprize, Inc. sued sub-subcontractors via its Third Party Complaint in Cambridge I who had only performed work on Phase II at the Cambridge project, despite PJ Interprize, Inc.'s arguments in Cambridge I that PJ Interprize, Inc. had not performed work on Phase II.

4.8 As part of a Response to a Summary Judgment Motion filed by PJ Interprize, Inc. during Cambridge 1, Cambridge Townhomes LLC and Polygon Northwest Company requested

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the ability to (a) add Gerald Utley d/b/a PJ Interprize "the sole proprietorship" as a party or (b) to assert allegations that PJ Interprize, Inc. bore successor liability for damages related to work performed by Gerald Utley d/b/a PJ Interprize "the sole proprietorship." Those requests were not ruled on by the Court during the hearing on PJ Interprize, Inc.'s Summary Judgment Motion.

4.9 Cambridge Townhomes LLC and Polygon Northwest Company then filed a Motion to Add Gerald Utley d/b/a PJ Interprize in Cambridge I. That Motion was denied.

4.10 During Cambridge I the subcontractor defendants therein filed a Motion for Summary Judgment concerning the indemnity claims pled against them in that action. That Motion was granted, dismissing the indemnity claims against the subcontractor defendants in Cambridge I. The dismissal of those indemnity claims from Cambridge I is currently pending an appeal filed by Cambridge Townhomes LLC and Polygon Northwest Company.

V. FACTS RELATING TO THE PJ INTERPRIZE ENTITIES

5.1 Gerald Utley d/b/a P.J. Interprize was a sole proprietorship, at all times relevant to this action doing business in King County. Gerald Utley d/b/a P.J. Interprize installed siding and certain related materials at the Cambridge project.

5.2 Gerald Utley d/b/a P.J. Interprize signed a Master Agreement with Polygon which applied to all projects on which Gerald Utley d/b/a P.J. Interprize performed work for Polygon. That Master Agreement contained a number of contractual provisions which applied to Gerald Utley d/b/a P.J. Interprize's work at the Cambridge project.

5.3 Gerald Utley d/b/a P.J. Interprize signed an Agreement of Subcontract for the Cambridge Townhomes project on or about August 26, 1998 wherein Gerald Utley d/b/a PJ Interprize agreed to perform siding installation and related work at Phase II of the Cambridge project. That Agreement of Subcontract incorporated by reference the provisions of the Master Agreement between Polygon and Gerald Utley d/b/a P.J. Interprize.

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5.4 In addition to the work referenced above, Gerald Utley d/b/a P.J. Interprize also performed certain work on Phase I of the Cambridge project pursuant to various Change Orders.

5.5 The Master Agreement between Polygon and Gerald Utley d/b/a P.J. Interprize required Gerald Utley d/b/a P.J. Interprize to defend, indemnify and hold Polygon harmless from any and all claims, demands, losses and liabilities related in any way to work performed by Gerald Utley d/b/a P.J. Interprize for Polygon.

5.6 The Master Agreement also required Gerald Utley d/b/a P.J. Interprize to name plaintiffs as additional insureds under Gerald Utley d/b/a P.J. Interprize's insurance policy.

5.7 P.J. Interprize, Inc. was a corporation formed under the laws of the State of Washington, at all times relevant to this action doing business in King County. P.J. Interprize, Inc. installed siding and certain related materials at the Cambridge project. One of the principals in the formation of PJ Interprize, Inc. was Gerald Utley.

5.8 P.J. Interprize, Inc. also signed a Master Agreement with Polygon. P.J. Interprize, Inc. signed an Agreement of Subcontract for the Cambridge Townhomes project on or about April 21, 1999 wherein P.J. Interprize, Inc. agreed to install siding and certain related materials to buildings in Phase 3 at the Cambridge project.

VI. FIRST CAUSE OF ACTION AGAINST DEFENDANT GERALD UTLEY D/B/A PJ INTERPRIZE – BREACH OF CONTRACT

6.1 Plaintiffs incorporate by reference paragraphs 1.1 – 5.8, above, as though the same were fully set forth herein.

6.2 The report issued by neutral expert Mark Jobe shows that some or all of the work performed by Gerald Utley d/b/a PJ Interprize was performed in violation of applicable building codes, manufacturers' specifications and/or industry standards.

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6.3 The violation of applicable building codes, manufacturers' specifications and/or industry standards constituted not only breaches of the implied warranties created by the Washington Condominium Act, but also constitute breaches of the contract between Gerald Utley d/b/a PJ Interprize and plaintiffs.

6.4 Gerald Utley d/b/a PJ Interprize has breached its contract with plaintiffs by failing to perform the work of its Subcontract Agreement in accordance with the terms of the Subcontract Agreement and the Master Agreement. This breach has caused plaintiffs damages in an amount to be proven at trial.

6.5 Pursuant to the terms of the Subcontract Agreement and Master Agreement, plaintiffs are entitled to an award of all attorneys' fees and costs against Gerald Utley d/b/a PJ Interprize.

VII. SECOND CAUSE OF ACTION AGAINST DEFENDANT GERALD UTLEY D/B/A PJ INTERPRIZE – CONTRACTUAL INDEMNITY

7.1 Plaintiffs incorporate by reference paragraphs 1.1 – 6.5, above, as though the same were fully set forth herein.

7.2 Gerald Utley d/b/a PJ Interprize agreed by contract to defend, indemnify and hold plaintiffs harmless from any and all claims, demands, losses and liabilities related in any way to work performed by Gerald Utley d/b/a PJ Interprize for plaintiffs.

7.3 Plaintiffs have settled claims relating to work improperly performed by Gerald Utley d/b/a PJ Interprize at the Cambridge project. Gerald Utley d/b/a PJ Interprize is obligated to fully indemnify plaintiffs for all sums expended to settle "claims, losses or liabilities" that are in any way related to Gerald Utley d/b/a PJ Interprize's work.

7.4 Plaintiffs should be awarded a sum sufficient to fully indemnify them for damages related to work performed by Gerald Utley d/b/a PJ Interprize which were paid in the settlement

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reached with the HOA, costs and expenses related to that settlement, and any and all costs and fees related to this action, including all attorneys' fees.

VII. FIRST CAUSE OF ACTION AGAINST DEFENDANT PJ INTERPRIZE, INC. – SUCCESSOR LIABILITY FOR ALL CLAIMS AGAINST GERALD UTLEY D/B/A PJ INTERPRIZE

8.1 Plaintiffs incorporate by reference paragraphs 1.1 – 7.4, above, as though the same were fully set forth herein.

8.2 Gerald Utley was a principal of Gerald Utley d/b/a PJ Interprize, a sole proprietorship.

8.3 Gerald Utley was also a principal of PJ Interprize, Inc., a Washington corporation.

8.4 Both Gerald Utley d/b/a PJ Interprize and PJ Interprize, Inc. performed work at the Cambridge project.

8.5 PJ Interprize, Inc. performed work at Cambridge after Gerald Utley d/b/a PJ Interprize performed work at Cambridge.

8.6 Both Gerald Utley d/b/a PJ Interprize and PJ Interprize, Inc. derived income from siding installation.

8.7 Gerald Utley shifted his form of doing business from a sole proprietorship to a corporation.

8.8 PJ Interprize, Inc. was, in fact, merely a new corporate form for the sole proprietorship Gerald Utley d/b/a PJ Interprize.

8.9 Since PJ Interprize, Inc. was, in fact, merely a new corporate form for the sole proprietorship Gerald Utley d/b/a PJ Interprize, PJ Interprize, Inc. was a "mere continuation" of Gerald Utley d/b/a PJ Interprize and assumed all of the liabilities of Gerald Utley d/b/a PJ Interprize.

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8.10 As an alternative theory of recovery, plaintiffs assert that PJ Interprize, Inc. bears any and all liability for any and all damages awarded against Gerald Utley d/b/a PJ Interprize in this matter.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that judgment be entered as follows:

A. Awarding plaintiffs damages in an amount to be proven at trial, to the extent that plaintiffs are reimbursed for all costs incurred in their defense and settlement of that portion of the underlying claims by the HOA that relate to work performed by Gerald Utley d/b/a PJ Interprize and/or PJ Interprize, Inc. as successor-in-interest, as well as plaintiffs' own attorneys' fees, expert fees, costs, home office expenses, and any and all other damages available under the law such that plaintiffs are fully and completely indemnified;

B. Such other and further relief as this Court deems fair, just and equitable..

DATED this 29th day of November, 2005.

PREG O'DONNELL & GILLETT PLLC

By _____
Jeffrey W. Daly
WSBA 26915
Mark F. O'Donnell
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No. 57328-4-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

CAMBRIDGE TOWNHOMES, LLC, a Washington limited liability company; POLYGON NORTHWEST COMPANY, a Washington general partnership, *Appellants*,

v.

PACIFIC STAR ROOFING, INC., a Washington corporation; P.J. INTERPRIZE, INC., a Washington corporation, *Respondents.*

DECLARATION OF SERVICE

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ORIGINAL

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on Friday, September 22, 2006, the undersigned caused to be served via ABC Messenger a copy of:

1. Brief of Respondent P.J. Interprize, Inc., and,

2. Declaration of Service.

Directed to the following entities/individuals:

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Signed this 22nd day of September 2006, at Seattle, Washington.

Vicki Milbrad

Vicki Milbrad